Eight Mile Style, LLC et al v. Apple Computer, Incorporated Doc. 40

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC and
MARTIN AFFILIATED, LLC,

Plaintiffs

vs.

APPLE COMPUTER, INC. and
AFTERMATH RECORDS d/b/a
AFTERMATH ENTERTAINMENT,

Defendants.

____________________________________/

Case No. 2:07-CV-13164
Honorable Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

DEFENDANTS AFTERMATH RECORDS' AND APPLE INC.'S BRIEF IN RESPONSE TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY

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CONCISE STATEMENT OF ISSUES PRESENTED

Whether the Court should deny Plaintiff's Motion to Compel Discovery where (1) Plaintiffs fail to justify the relevancy of their broad requests; (2) Plaintiffs seek discovery on Aftermath's profits and losses, yet the Complaint does not allege copyright infringement by Aftermath; (3) Plaintiffs' Motion ignores compromises reached during the meet and confer process, burdening the Court with already resolved matters; and (4) Defendants' have a Motion to Bifurcate and a Motion for Summary Judgment pending that will have a significant impact on this Motion to Compel?

Defendants' answer: "Yes."

CONTROLLING AUTHORITIES

Fed. R. Civ. P. 26

17 U.S.C. §§ 106, 115

ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60 (2d Cir. 1996)

Allen v. Howmedica Leibinger, 190 F.R.D. 518 (W.D. Tenn. 1999)

Palmer v. Braun, 376 F.3d 1254 (11th Cir. 2004)

Robert Stigwood Group Ltd. v. O'Reilly, 530 F.2d 1096 (2d Cir. 1976)

Subafilms, Ltd. v. MGM-Pathe Comm'ns Co., 24 F.3d 1088 (9th Cir. 1994)

United States v. Am. Soc'y of Composers, Authors & Publishers, 485 F. Supp. 2d 438 (S.D.N.Y. 2007)

Update Art, Inc. v. Modiin Pub., Ltd., 843 F.2d 67 (2d Cir.1988)

Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* (2007)

BRIEF IN RESPONSE TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY

I. INTRODUCTION

Plaintiffs' Motion to Compel Discovery does not tell a complete story and fails to establish a basis to compel the production of documents beyond what Defendants Aftermath Records ("Aftermath") and Apple Inc. ("Apple") (jointly "Defendants") already have agreed to provide. In response to many of the requests on which Plaintiffs are moving, Defendants have agreed to provide much of the information Plaintiffs seek, notwithstanding Defendants' objections based on relevancy and burden. Plaintiffs apparently bring this Motion because they want even more, without any effort to explain why their requests are relevant or justified in light of the immense burden imposed by many of the requests.

Since April 2008, the parties have engaged in extensive meet and confer efforts. The parties conferred telephonically on two dates and followed up with email exchanges. In a good faith effort to resolve the discovery disputes, Defendants said they would produce and have produced certain categories of documents since the meet and confer efforts. Plaintiffs' Motion does not explain and is not tailored to reflect these developments. Instead, in most cases Plaintiffs merely lay out their contested requests, state in a conclusory fashion that the information sought is relevant, and cite boilerplate law on the discovery of relevant evidence. In yet other places, Plaintiffs do not even attempt to show the relevancy of their requests. Many of their requests seek discovery on Aftermath's profits and losses for purposes of calculating Plaintiffs' alleged damages, yet the Complaint does not allege copyright infringement by Aftermath. Apple, not Aftermath, is the alleged infringer according to the Complaint, and Apple's net profits should be used to measure alleged damages if liability is proven. Plaintiffs' failure to tell the complete story of the discovery disputes and support the relevance of their requests is a waste of judicial resources.

Moreover, two motions currently pending in front of the District Judge will have a significant impact on this Motion to Compel. Defendants filed a Motion to Bifurcate demonstrating that the liability issues in this case are separate and distinct from the damages issues, and that engaging in damages discovery will be a complete waste of time and money if liability is never proven.[1] Defendants also have filed a Motion for Summary Judgment explaining why the liability question should be resolved as a matter of law in their favor.[2] At the very least, the pending Motions provide ample reason to deny Plaintiffs' damages discovery requests until the Court has determined liability. Plaintiffs' Motion to Compel should be denied in its entirety for the additional reasons summarized above.

II. BACKGROUND

A. What This Case Is About – Whether Defendants Were Authorized to Use the Compositions in Issue

The Plaintiffs in this case are Eight Mile Style, LLC ("Eight Mile") and Martin Affiliated, LLC ("Martin Affiliated") (jointly "Plaintiffs"). Compl. ¶¶ 1-2. The Plaintiffs claim to have ownership interests in 93 musical compositions that are "written and composed, in part, by Marshall B. Mathers, III, professionally known as 'Eminem'" ("Eminem Compositions"). *Id.* ¶ 8. Plaintiffs' claim that all of the Eminem Compositions are copyrighted works under the Copyright Act, 17 U.S.C. § 101 *et seq.* The evidence in this case will show that Plaintiffs, both expressly and impliedly, have licensed the uses of the Eminem Compositions to Defendants, completely barring Plaintiffs' claim of copyright infringement.

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[1] Defendants filed their bifurcation motion on May 9, 2008.

[2] Defendants filed their Motion for Summary Judgment on May 5, 2008.

Plaintiffs filed their Complaint in this Court on July 30, 2007, naming only Apple as a Defendant. Aftermath intervened in this action with Plaintiffs' consent.[3] *See* Stipulated Order Permitting Intervention (Docket Entry No. 8) (filed Sept. 7, 2007). Plaintiffs claim that Apple has been distributing through its iTunes store "digital downloading of recordings" by the recording artist Eminem that embody the Eminem Compositions. Compl. ¶¶ 9-12. Plaintiffs contend that Apple infringed Plaintiffs' copyrights in the Eminem Compositions by allegedly distributing those recordings without Plaintiffs' authorization. *Id.* ¶ 13. The Complaint expressly avers that Apple has distributed the Eminem sound recordings with the authorization of UMG Recordings, Inc. ("UMG"), a partner in the Aftermath joint venture and the entity that distributes recordings in Aftermath's catalogue.[4] *Id.* ¶ 12. Because Plaintiffs' Complaint implicates the right of Aftermath (through UMG) to sell in digital format the sound recordings embodying the Eminem Compositions, Aftermath was permitted to intervene as a party Defendant. Aftermath owns the sound recordings embodying the Eminem Compositions pursuant to its written recording agreements with Eminem, dated March 9, 1998 ("1998 Agreement") and July 2, 2003 ("2003 Agreement").[5]

As detailed in Defendants' Motion for Summary Judgment, the evidence will show that Plaintiffs either expressly or impliedly authorized Defendants' distribution of sound recordings embodying the Eminem Compositions. The 1998 and 2003 Agreements (negotiated and/or signed by the individuals who own the Plaintiff LLC corporations in this case) contain "Controlled Composition" clauses expressly providing that any compositions written in whole or in part by Eminem (in other words, all of the Eminem Compositions in issue in this case) "will be licensed to Aftermath and its distributors/licensees" for use in sound recordings in exchange for a specified royalty. Summary Judgment Exs. A ¶ 6(a) (1998 Agreement) & D ¶ 6 (2003 Agreement). This express authorization in the Agreements is a total bar to Plaintiffs' claim for copyright infringement.

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[3] Aftermath is a joint venture whose partners include UMG Recordings, Inc. ("UMG"); Interscope Records, a California general partnership, whose general partner is UMG; and ARY, Inc.

[4] The UMG in "UMG Recordings" is an acronym for Universal Music Group. Plaintiffs' Complaint refers to UMG as "Universal." *See* Compl. ¶ 12.

[5] A related matter is pending in the Central District of California. In that case, Plaintiffs' affiliated LLC corporations are suing Aftermath and the three entities that own the Aftermath joint venture for breach of the 1998 and 2003 Agreements ("F.B.T. case"). The Plaintiffs claim that Aftermath has not calculated the royalties owed to them on the sales of digital downloads through iTunes and other digital retailers under the correct contractual rate.

But *even if* the Agreements did not expressly authorize the challenged uses of the Eminem Compositions, Defendants would *still* be entitled to summary judgment because Plaintiffs have also impliedly licensed the challenged uses. The Eminem Compositions were delivered to Aftermath to be exploited and Plaintiffs have received and accepted (and are continuing to receive and accept) substantial royalties for the very rights they now say they never granted. As a matter of a law and without anything more, this creates an implied license barring Plaintiffs' claim for copyright infringement.

B. Defendants' Pending Motion to Bifurcate

Because there is no overlap between the liability and damages issues in this case, and damages discovery would be particularly burdensome, Defendants have filed a Motion to Bifurcate liability and damages for discovery and trial purposes. Plaintiffs are seeking Defendants' net profits under the Copyright Act, 17 U.S.C. § 504(b). This discovery would include an inquiry into Defendants' profits less their deductible expenses, a time-consuming and complex inquiry. *See generally* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.03 (2007) (canvassing multiple issues subsumed in inquiry into defendant's net profits); Declaration of Charles Ciongoli in Support of Motion to Bifurcate ("Ciongoli Decl.") ¶¶ 5-8.[6]

[6] Defendants include the Ciongoli Declaration as Exhibit 1 to this Brief. (The Ciongoli Declaration was filed as Exhibit 7 to Defendants' Motion to Bifurcate.)

The discovery would also require an apportionment – typically done by experts – between the alleged infringing and non-infringing portions of each work allegedly infringed. *See* 4 Nimmer, *supra*, § 14.03. The information that is related to Plaintiffs' infringement claim – namely, whether Aftermath had the right to sell the sound recordings through Apple's iTunes and the Eminem Compositions embodied in them – is entirely separate and unrelated to the complex damages discovery and trial testimony that would be required to litigate Plaintiffs' claim for Defendants' profits attributable to the alleged infringement. Under these circumstances, well-established Sixth Circuit law recognizes that bifurcation of liability and damages is appropriate.

C. Meet and Confer Efforts

Pursuant to Local Rules 7.1(a) and 37.1, the parties met telephonically on two dates, April 8 and 9, 2008, to confer on discovery disputes. All of the interrogatories and document requests in issue in Plaintiffs' Motion were discussed during the telephonic meet and confer. In addition, Plaintiffs' counsel sent emails on April 16 and 18, 2008, setting forth compromises on many of the contested requests that are nowhere reflected in the Motion. Defendants' counsel responded by email on April 25, 2008, setting forth Defendants' position on many of the contested requests and representing to Plaintiffs that productions would be forthcoming, none of which, again, is reflected in the instant Motion. Further, Defendants produced documents on April 19, May 5, and May 9, 2008 responding in part to many of the contested requests.

III. ARGUMENT

A. Interrogatory No. 3: Details of All Communications Concerning the Eminem Compositions

Plaintiffs fail to explain the relevance of their immensely burdensome request for details of "all communications" concerning the Eminem Compositions. *See Allen v. Howmedica Leibinger*, 190 F.R.D. 518, 522 (W.D. Tenn. 1999) (noting that the party seeking information has the burden of demonstrating relevance when a relevance objection is raised). Defendants raised their relevance and burden objections during the meet and confer process. The parties reached a compromise with respect to this interrogatory and similar requests; however, Plaintiffs' Motion completely ignores the meet and confer efforts and the subsequent compromise that narrowed the immense range of communications sought here.

During the meet and confer process, Plaintiffs proposed to limit the information requested by this interrogatory (and a number of other overly broad document requests and interrogatories) to a list of topics that Plaintiffs' counsel would send in an email to Defendants' counsel. In an email dated April 16, 2008, Plaintiffs' counsel advised that they were "willing to modify [their] broad requests seeking all documents pertaining to the Eminem songs to certain categories of information." Ex. 2 (April 16, 2008 Email from Richard Busch). The seven topics to which Plaintiffs agreed to limit certain of their requests, including Interrogatory No. 3, were as follows:

> (1) any documents concerning whether there was a need to obtain a publishing or mechanical license from plaintiffs;
>
> (2) any publishing or mechanical licenses allegedly obtained;
>
> (4) [sic] whether plaintiffs had executed/returned such licenses[;]
>
> (4) any analysis of the controlled composition clause and what the language allows versus other Aftermath controlled composition clauses;
>
> (5) any communications with Joel [Martin] on these topics;
>
> (6) financial documents from Apple relating to the songs themselves, as well as their accounting to UMG or Aftermath' [sic][;] and
>
> (7) the number of downloads of the songs and the dates thereof.

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Id.[7] The first three topics concerning "publishing" or "mechanical" licenses relate to Defendants' authorization to distribute sound recordings embodying the Eminem Compositions. The term "mechanical license" commonly refers to a license to make and distribute sound recordings embodying musical compositions. *See generally* 2 Nimmer, *supra*, § 8.04[A] (explaining the compulsory mechanical license provision of the Copyright Act, 17 U.S.C. § 115, and the reference to such a license with the "'mechanical label'"). In an email dated April 25, 2008, Defendants' counsel informed Plaintiffs' counsel that Aftermath was working to identify supplemental communications responsive to these three topics and hoped to produce documents soon. Ex. 3 (April 25, 2008 Email from Melinda LeMoine). Aftermath served a supplemental production including documents responsive to the "mechanical license" topics on May 5, 2008.

Regarding the fourth and fifth limiting topics, Aftermath informed Plaintiffs it was working to confirm that its initial search and production of documents would have encompassed any analyses of the Controlled Composition clauses of the 1998 and 2003 Agreements and any communications with Joel Martin, the owner of Plaintiff Martin Affiliated and manager of Plaintiff Eight Mile, on the limiting topics. *Id.* Aftermath can confirm that it has performed a reasonably diligent search for topics four and five, and has produced all responsive non-privileged documents found as a result of that search.

As to Apple, Defendants explained in the April 25, 2008 email that, after a reasonably diligent search, Apple did not locate any documents responsive to topics one through five. *Id.* Defendants also informed Plaintiffs that Apple would produce download reports in response to topics six and seven. *Id.* The download reports show the number of Eminem sound recordings downloaded through iTunes, the approximate date of the downloads, and the amount paid to

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[7] Although counsel's email refers to limiting requests seeking "documents," as noted above, Plaintiffs represented during the telephonic meet and confer that this list of limiting topics would apply to Interrogatory No. 3 also.

UMG for the downloads. Apple has recently produced these download reports in response to a non-party subpoena issued by Plaintiffs' affiliated LLCs in the F.B.T. case. Rather than re-produce the reports, Apple will agree that Plaintiffs may use the reports produced in the F.B.T. case for purposes of this lawsuit.[8]

Plaintiffs do not explain any of these extensive meet and confer efforts in their Motion. Plaintiffs offer no explanation as to what portion of Defendants' response to the proposed compromise, if any, Plaintiffs object to or why it is deficient. Defendants' initial productions and recent productions on May 5 and May 9 in response to Plaintiffs' limiting topics are more than sufficient. Plaintiffs do not attempt to explain why "all communications" concerning the Eminem Compositions are relevant, much less why they want to repudiate the compromise reached during the meet and confer process. To order Defendants to produce more than what was agreed upon would reward Plaintiffs' bad-faith repudiation of the meet-and-confer agreement and their attempt to overburden the Court with already resolved matters. Defendants should not be ordered to do more than what the parties agreed on.

Moreover, to require Defendants to detail all oral communications that ever occurred concerning the seven topics would be unduly burdensome and practically impossible. Plaintiffs have taken or are taking the depositions of the individuals most likely to have had oral communications about these topics. These individuals include Aftermath witnesses Chad Gary, Todd Douglas, Rand Hoffman, Lisa Rogell, and Peter Paterno. Plaintiffs have also recently noticed even more depositions. These depositions are the far more convenient and efficient way to obtain details of oral communications on the seven topics. *See* Fed. R. Civ. P. 26(b)(2)(C)(i) (mandating that courts limit discovery where they find that the discovery "can be obtained from some other source that is more convenient, less burdensome, or less expensive"). Plaintiffs' Motion as to Interrogatory No. 3 should be denied.

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[8] The protective orders entered by the Courts in the F.B.T. case and this case expressly contemplate such dual use of the evidence. Exs. 7 ¶ 4 (Protective Order in this case) & 8 ¶ 4 (Protective Order in F.B.T. case).

B. Interrogatory No. 6: Basis for the Belief That Apple Has Certain Rights in Connection With the Eminem Compositions

Plaintiffs seek the basis for Defendants' belief that "Apple has the right to synchronize with images, transmit, publicly perform, or reproduce lyrics of the Eminem Compositions." Their argument with respect to this interrogatory consists of the conclusory statement that this is "clearly relevant" because Defendants believed they "had the right to take certain actions" that were "exclusive rights of the copyright holder." Mot. at 3. To the contrary, these rights are entirely irrelevant because they are not implicated by Plaintiffs' Complaint for copyright infringement of the Eminem Compositions. These other rights do not become relevant merely because Plaintiffs say so. *See Allen*, 190 F.R.D. at 522 (noting that the party seeking information has the burden of demonstrating relevance when a relevance objection is raised).

The synchronization right referenced in Plaintiffs' interrogatory is the right to use a musical composition in "synchronization or 'timed-relation' with an audiovisual work, such as a theatrical or television motion picture or commercial." 6 Nimmer, *supra*, § 30.02[F][3]. Plaintiffs' Complaint deals with permanent downloads that are "musical performances in the form of a digital audio file" – not visual images in synch with a musical composition. Compl. ¶ 9. The synchronization right cannot possibly be relevant here. Similarly, the public performance right is inapplicable to the permanent downloads of sound recordings alleged in the Complaint. *United States v. Am. Soc'y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438, 443-46 (S.D.N.Y. 2007) (holding that "the downloading of a digital music file" does not "constitute a public performance" under the Copyright Act). The public performance right applies when a work is performed "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered," or when a work is communicated to the public "by means of any device or process," like a television broadcast, a radio broadcast, or the streaming of sound recordings on the Internet. 17 U.S.C. § 101. *See also id.* § 106(4); 2 Nimmer, *supra*, § 8.14[C][1]-[2]. A permanent download that "allows an end user to copy the file from Apple to the end user's own individual digital storage devices," Compl. ¶ 9, is not a public performance, and the Complaint does not allege that it is. *Am. Soc'y of Composers, Authors & Publishers*, 485 F. Supp. 2d at 443-46.

The reproduction of lyrics is not in issue here either. Plaintiffs' Complaint does not allege that Defendants have made copies of lyrics available, and Apple has not, in fact, done this. *See ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 64 (2d Cir. 1996) (distinguishing between using a composition in a sound recording, which a mechanical license permits, and including a print copy of lyrics with that sound recording, which requires a separate license). As to the purported "right to . . . transmit," this is not one of the exclusive rights granted to a copyright owner of a musical composition under the Copyright Act. *See* 17 U.S.C. § 106.

The relevant rights here are the rights of Defendants to make and distribute sound recordings embodying the Eminem Compositions. The Controlled Composition clauses of the 1998 and 2003 Agreements give them these rights. Consistent with the Controlled Composition clauses, Plaintiff Eight Mile signed numerous mechanical licenses confirming Defendants' rights to use the Eminem Compositions to manufacture and sell sound recordings. Defendants have set forth the basis for this license clearly in their Motion for Summary Judgment. Plaintiffs' Motion with respect to these other irrelevant rights should be denied.

C. Interrogatory No. 11: All Sources of Revenue, Foreign and Domestic, Received by Apple From Sound Recordings Embodying the Eminem Compositions

Plaintiffs' Motion should be denied as to this interrogatory because damages discovery should be bifurcated from the issue of liability. Defendants' pending Motion for Bifurcation explains how the issue of liability does not overlap at all with the issue of damages.

Furthermore, the Motion to Bifurcate demonstrates that discovery into Aftermath's net profits is immensely burdensome. Under well-established principles of judicial economy, the discovery sought by this interrogatory should be bifurcated and the Motion to Compel denied.

As to domestic sources of revenue, if the Court determines that damages discovery should not be bifurcated, Apple can produce a profit and loss analysis specific to the sound recordings embodying the Eminem Compositions. This profit and loss analysis will show Apple's revenues attributable to the sale of sound recordings embodying the Eminem Compositions.

As to foreign sources of revenue, Plaintiffs fail to explain why or cite any authority for the proposition that revenue for foreign sales is relevant to Plaintiffs' claims. It is an "'undisputed axiom'" that "the United States' copyright laws have no application to extraterritorial infringement." *Subafilms, Ltd. v. MGM-Pathe Comm'ns Co.*, 24 F.3d 1088, 1095 (9th Cir. 1994) (quoting 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 12.04[A][3][b] (1993)). *See also Palmer v. Braun*, 376 F.3d 1254, 1258 (11th Cir. 2004) ("[F]ederal copyright law has no extraterritorial effect, and cannot be invoked to secure relief for acts of infringement occurring outside the United States."); *Update Art, Inc. v. Modiin Pub., Ltd.*, 843 F.2d 67, 73 (2d Cir.1988) ("It is well established that copyright laws generally do not have extraterritorial application."); *Robert Stigwood Group Ltd. v. O'Reilly*, 530 F.2d 1096, 1101 (2d Cir. 1976) ("Copyright laws do not have extraterritorial operation."). The Motion should be denied on relevancy grounds and based on the pending bifurcation motion.

D. Interrogatory No. 12: All Costs Incurred by Apple Relating to Providing Digital Downloads to Consumers

The purpose of this interrogatory is to determine expenses Apple may deduct from its revenues to arrive at net profits attributable to the use of the Eminem Compositions. The Motion should be denied as to this interrogatory for the reasons set forth in Defendants' Motion to Bifurcate. Discovery into damages is premature at this point.

Nevertheless, Apple has produced download reports in the F.B.T. case showing the amount that it pays to UMG for each download of sound recordings embodying the Eminem Compositions. This is one cost that Apple incurs in connection with the sale of digital downloads of Eminem sound recordings to consumers. As explained in the foregoing, if the Court determines that damages discovery should not be bifurcated, Apple can produce a profit and loss analysis that is specific to the sound recordings embodying the Eminem Compositions. This profit and loss analysis will provide an allocation of other costs Apple incurs attributable to the sale of sound recordings embodying the Eminem Compositions.

E. Interrogatory No. 13: All Payments Made by Apple to UMG for Sound Recordings Embodying the Eminem Compositions

This interrogatory relates to Defendant's net profits and should await a determination as to liability, for the reasons set forth in Defendants' Motion to Bifurcate. Nevertheless, in connection with the F.B.T. case, Apple has already produced download reports showing all the payments Apple has made to UMG relating to the Eminem Compositions.

F. Interrogatory No. 14: All Categories and Types of Payments Made by Apple to UMG with Respect to Repertoire, Creative Services, Technology, or Other Intellectual Property Licenses

The Motion should be denied as to this interrogatory for the reasons set forth in Defendants' Motion to Bifurcate. In addition, Plaintiffs' argument with respect to this extremely broad interrogatory consists of one statement – this information is "discoverable and relevant to the issue of damages." Mot. at 5. Just saying information is relevant does not make it so, however. *See Allen*, 190 F.R.D. at 522 (noting that the party seeking information has the burden of demonstrating relevance when a relevance objection is raised).

During the meet and confer process, Defendants asked for clarification on what Plaintiffs are seeking in this interrogatory. Plaintiffs' convoluted response provided no clarity. They stated the following:

> We want to know every type of consideration, going in each direction, between Apple and Aftermath/Universal concerning services, data, materials or rights provided by Aftermath/Universal, not only with respect to the intellectual property itself embodied in sound recordings and musical compositions, but also with respect to any other services, data or materials provided, and rights granted, in conjunction with the sound recordings and musical compositions. For example, and without limitation, we want to know whether payments or other consideration was given to Aftermath and/or Interscope and/or Universal Music Group, whether in the form of cash, financial guarantees, advances, fees, royalties, promotional items, goods, services, marketing or advertising commitments, options or grants of stock, or other consideration, for such things as grants of exclusivity, creative services, data, artwork, catalog management, duplication, lyric print rights, synchronization rights, public performance rights, name and/or likeness rights, trademark, software or other intellectual property rights, administration of contracts and/or third party clearances and payments.

Ex. 4 (April 18, 2008 Email from Richard Busch). Plaintiffs' interrogatory is not limited to information relating to the Eminem Compositions, but, as best as Defendants can ascertain, appears to seek this information for *all UMG artists* whose sound recordings are sold by Apple. Payment for other artists' content has nothing to do with net profits and alleged damages for use of the Eminem Compositions, and Plaintiffs' Motion identifies no such conceivable relevance. To the extent this interrogatory is limited to the Eminem Compositions, Apple already has identified the payments it made to UMG for the Eminem sound recordings. Anything beyond this is irrelevant.

G. **Interrogatory No. 16: All Parties Who Have Obtained Rights at Any Time to Reproduce, Distribute, or Sell Sound Recordings Embodying the Eminem Compositions in Digital Format**

Aftermath has produced over 400 agreements with over 100 parties who UMG has given the right to distribute sound recordings in UMG's catalog, including recordings embodying the Eminem Compositions. Plaintiffs can easily ascertain the identities of these parties by examining the agreements. During the meet and confer process, Defendants explained that Aftermath will supplement its interrogatory response to state this. Plaintiffs completely omit this meet and confer history from their Motion.

H. **Interrogatory No. 18: All Musical Copyright Owners and Administrators Who Have Entered Into Agreements With Apple for the Use of Musical Compositions**

This Motion should be denied as to this interrogatory. During the meet and confer process, Defendants explained that if Plaintiffs were referring to mechanical licenses, Apple does not enter into such licenses directly with musical copyright owners or administrators. Plaintiffs suggested that there were certain artists who had objected to the distribution of recordings embodying their compositions on iTunes, and that Apple might have agreements with these artists. Defendants requested that Plaintiffs identify these artists. Plaintiffs responded as follows:

> You wanted to know if we had any artist agreements in mind in connection with our request for such agreements from Apple. We don't have any specific artist in mind. To be clear, we are asking for any agreements in which Apple has direct contractual privity with a recording artist, songwriter, or publisher alone or in conjunction with a record company or other third party. We have no specific agreement in mind[.]

Ex. 4 (April 18, 2008 Email from Richard Busch). Plaintiffs' response does not change the fact that Apple has not entered into licenses directly for rights to musical compositions, whether it be with a recording artist, songwriter, publisher, or other copyright administrator.

I. Interrogatory No. 19: Whether the So-Called Major Label Companies Purport to Grant Licenses to Apple for Mechanical Reproduction of Underlying Compositions

The information sought by this interrogatory is irrelevant. Plaintiffs claim that this information is relevant "in interpreting the contracts between Apple and UMG in this case." Mot. at 6. Plaintiffs concede in their Complaint that Apple distributes sound recordings embodying the Eminem Compositions pursuant to authorization from UMG. Compl. ¶ 12. The authorization from UMG to Apple is not in question in this case. The narrow issue in this case is whether the 1998 and 2003 Agreements and the parties' course of conduct under these agreements authorized UMG to make and distribute sound recordings embodying the Eminem Compositions.

The Plaintiffs in the F.B.T. case made a similar request for documents from Apple relating to the formation of agreements between Apple and UMG or any other record companies for the "distribution of music in digital format." Ex. 5 at 3 (Subpoena Duces Tecum to Apple in F.B.T. case). The Court there denied the Plaintiffs' motion to compel on this request to the extent it related to record companies other than UMG. Ex. 6 (Court's Minutes Denying in Part and Granting in Part Plaintiffs' Motion to Compel in F.B.T. Case). As there, Plaintiffs' request for information relating to agreements with other record companies should be denied.

J. Request for Production No. 6: Every License, Contract, or Agreement that Defendants Have Entered Into Concerning the Eminem Compositions

Plaintiffs offer no explanation for the relevance of this overly broad request for every agreement concerning the Eminem Compositions for any purpose, stating only that Defendants "must produce" any agreements for any purpose. Defendants have already produced the relevant agreements in this case between UMG and Apple that give Apple the authority to distribute sound recordings embodying the Eminem Compositions. Although Defendants do not believe they are relevant, Aftermath has also produced UMG's agreements with other digital download providers in connection with the F.B.T. case. Additionally, Aftermath has produced the 1998 and 2003 Agreements, which granted Aftermath and its distributors and licensees rights to the Eminem Compositions, as well as mechanical licenses for the Eminem Compositions.

As to Apple, Defendants informed Plaintiffs during the meet and confer process that Apple would not have any agreements concerning the Eminem Compositions other than the UMG/Apple agreement for digital distribution and an agreement concerning the use of the Eminem recording "Lose Yourself" in a commercial advertisement for Apple's iTunes and iPod. Plaintiffs represented that they were not seeking documents concerning the "Lose Yourself" commercial advertisement. Ex. 4 (April 18, 2008 Email from Richard Busch). Accordingly, Defendants have already produced all relevant agreements.

K. Request for Production No. 7: Every License Request Received Relating to the Reproduction, Distribution, Performance, and Sale of Recordings Embodying the Eminem Compositions in Digital Format

Plaintiffs yet again fail to explain the relevance of this request. *See Allen*, 190 F.R.D. at 522 (noting that the party seeking information has the burden of demonstrating relevance when a relevance objection is raised). To the extent Plaintiffs are requesting mechanical license requests sent to Plaintiffs for the Eminem Compositions, Aftermath made a good faith effort to search for and produce such requests. Defendants informed Plaintiffs of their efforts during the meet and confer process. Ex. 3 (April 25, 2008 Email from Melinda LeMoine). Defendants also informed Plaintiffs that, as expected (given that, under its agreement with UMG, Apple is not responsible for handling mechanical licenses), Apple did not locate any such requests.

L. Request for Production No. 13: Every Document That Indicates the Dates Copies of Sound Recordings Embodying the Eminem Compositions Were Made for Any Purpose

To the extent Plaintiffs seek the dates requested herein for damages purposes, the Motion should be denied. Damages discovery is premature unless and until the Court determines that bifurcation is not appropriate in this case. This request also seeks irrelevant information; Plaintiffs have not explained how the dates that copies were made of the sound recordings embodying the Eminem Compositions are relevant. *See Allen*, 190 F.R.D. at 522 (noting that the party seeking information has the burden of demonstrating relevance when a relevance objection is raised). Even if the dates were relevant to determining damages or for statute of limitations purposes, this request seeks dates of *all copies* for *any purpose*, not just copies made by Apple relating directly to the sale through iTunes of Eminem sound recordings. Plaintiffs' Complaint is far more limited in scope than this request. The Complaint alleges that only Apple has infringed the copyrights in the Eminem Compositions. Compl. ¶¶ 13-15. Therefore, only copies directly relating to the sale of Eminem sound recordings over iTunes are relevant.

Notwithstanding Defendants' objections, Defendants have produced records that show the approximate dates copies of the sound recordings embodying the Eminem Compositions were delivered to consumers through Apple's iTunes. The download reports produced by Apple report sales for approximately 30-day time periods. Aftermath has produced royalty statements that report sales, including sales of digital downloads, on a quarterly basis.

M. Request for Production No. 14: Every Document That Shows Sales and Revenue Figures, Expenses, Profits and Losses, and Reserves for Distribution of the Sound Recordings Embodying the Eminem Compositions

This is another request seeking information for damages purposes that should be denied unless and until the Court first determines that bifurcation is not appropriate in this case. As explained in the Motion to Bifurcate, producing the requested profit and loss analysis for the 93 Eminem Compositions would be incredibly burdensome for Aftermath. An analysis of deductible expenses would begin with UMG's variable costs, such as the royalty payments to artists, producers, publishers, and unions. After variable costs are deducted from UMG's revenues, UMG must consider nonvariable costs such as marketing expenses and recording costs. *See* Ciongoli Decl. ¶ 6. UMG would then have to determine how to allocate these nonvariable costs on a composition-by-composition basis for the Eminem Compositions in issue. This process would consume hundreds of hours of UMG employee time over a month or more.

Id. ¶ 8. This burden is completely unjustified, especially given that Aftermath's profits and losses are irrelevant; Apple, not Aftermath, is the alleged infringer according to Plaintiffs' Complaint, and Apple's net profits should be used to measure alleged damages.

Apple can produce a profit and loss analysis for domestic sales that is specific to the sound recordings embodying the Eminem Compositions with somewhat less burden. Foreign sales, however, are not relevant (and creating a similar profit and loss analysis for all foreign territories would be considerably more burdensome) and should be not be included in the analysis, whether it is Apple's net profits or both Defendants' net profits in issue. *See, e.g.*, *Palmer*, 376 F.3d at 1258; *Subafilms*, 24 F.3d at 1095.

N. Request for Production No. 16: Every Document Showing All Payments from Apple to UMG for Sound Recordings Embodying the Eminem Compositions

This discovery relates to damages and should be denied until the Court determines that bifurcation is not appropriate. Apple's recently produced download reports nevertheless show payments Apple has made to UMG for the distribution of sound recordings embodying the Eminem Compositions.

O. Request for Production No. 19: Every Document Showing Costs Relating to the Downloading or Streaming of the Eminem Compositions

The damages discovery sought by this request is premature and should await a ruling on Defendants' Motion to Bifurcate, particularly because of the burden to Aftermath of compiling cost information. Ciongoli Decl. ¶¶ 5-8. Apple may produce a profit and loss analysis for domestic sales if the Court does not bifurcate discovery. Even if liability and damages are not bifurcated, Aftermath's costs are not relevant because Apple is the alleged infringer, according to Plaintiffs' Complaint.

P. Request for Production No. 22: Every Mechanical License for the Reproduction of the Eminem Compositions

The Motion is moot as to this request. Aftermath agreed to search for and produce mechanical licenses for the Eminem Compositions, contrary to Plaintiffs' assertion otherwise. *See* Ex. 3 (April 25, 2008 Email from Melinda LeMoine). Aftermath produced such documents on May 5, 2008. Defendants informed Plaintiffs that Apple had no such documents well before Plaintiffs filed this Motion. *Id.*

Q. Request for Production No. 25: All "Notices of Intention to Obtain a Compulsory License" under Section 115 of the Copyright Act Received by Defendants

Defendants do not "receive" compulsory license requests under Section 115 of the Copyright Act for the Eminem Compositions. Any such requests would be sent to the publishers of the Eminem Compositions. To the extent that compulsory license requests were sent relating to the Eminem Compositions, Aftermath searched for and produced any such documents that were located.

R. Request for Production No. 26: All Mechanical Licenses Between Apple and Any Third Party

As to this request, Defendants incorporate by reference their discussion of Interrogatory No. 18.

S. Request for Production No. 27: Basic Form Recording Agreements Predominantly Being Used Among UMG's Labels

Plaintiffs' Motion ignores the fact that Aftermath has already produced documents responsive to this request. Aftermath does not have a "basic form recording agreement," but it produced all other Aftermath artists' recording agreements that it could locate from the time period 1996-2006. The Motion should be denied as to this request.

T. Privilege Log

This is yet another instance of Plaintiffs failing to tell a complete story. Aftermath produced privilege and redaction logs on April 16, 2008, covering privileged documents relating to both this case and the F.B.T. case. Defendants intend to produce supplements to these logs. By contrast, Plaintiffs have failed to produce *any* logs, even though they have produced redacted documents without any indication as to the basis for the redactions.

IV. CONCLUSION

For the foregoing reasons, Aftermath and Apple respectfully request that the Court deny Plaintiffs' Motion to Compel in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that on 5/16, 2008, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the all counsel.

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